

No. 89-1577

IN THE
Supreme Court Of The United States

October Term, 1989

James L. Hooper,

Petitioner,

v.

John Gill, Jr., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
Court of Special Appeals of Maryland

REPLY TO BRIEF IN OPPOSITION

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1. Respondents contend petitioner was not denied Due Process (Op. at 8-9), arguing that “[t]he issue of whether a party is entitled to compensatory and/or nominal damages... is strictly an issue of Maryland state law” (Op. at 9). Whether nominal damages are recognized for particular conduct may be a question of state law. However, once that entitlement is established by state law, as it is in Maryland for breach of contract and deliberate torts (*see*, Pet. at 8-10), the courts of the state cannot arbitrarily permit the award in some such cases and not in others. It is the arbitrary and capricious denial of the right that

* Our Petition and the Brief in Opposition incorrectly indicate the Petition is for a writ of certiorari to the Court of Appeals of Maryland. That court denied discretionary review of the decision of the Court of Special Appeals of Maryland. Accordingly, the Petition properly should seek review of the judgment of the Court of Special Appeals. *See*, Rule 13.1, Rules of the Supreme Court of the United States. (All Rule citations hereafter are to the Rules of this Court.)

is the gravamen of petitioner's Constitutional contentions with respect to Question One.¹

With respect to respondents' contention that nominal damages (including significant costs)² do not involve "substantial rights" (Op. at 10), we note that the argument ignores, without comment, *inter alia*, this Court's decision in *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (*see*, Pet. at 10). The rights involved, as stated by this Court, are substantial. Accordingly, the error is not "harmless", as respondents contend.³

2. Throughout this litigation, petitioner asserted his Fifth, Sixth, and Fourteenth Amendment rights were violated. That assertion was made as part of his 42 U.S.C. 1983 claim which first was raised less than a month after this action was instituted. The claim has been maintained continuously. *See*, Op. at 2, 12-13; Pet. at 6-7, 13-14, A. 10-11, 60-61. Furthermore, petitioner contended from the outset that Gill's conduct was violative of the most basic concepts of the adversary system.

Our argument that the decision below is contrary to the policies underlying the cited Constitutional provisions effectively was raised.

¹ Petitioner does not contend Due Process requires two trials. He contends that based on the admitted facts he clearly was entitled under Maryland law to judgment as a matter of law, or to a remand. The Court of Special Appeals arbitrarily denied petitioner those rights for reasons that are unsupportable in law. *See*, Pet. at 10. Neither *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), nor *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (Op. at 9), supports respondents' contention that petitioner was accorded Due Process by the Maryland Appellate Courts with respect to the nominal damages issue. Those cases focus solely on what Due Process requires for a grant of temporary relief. We are at a loss to understand why respondents cite them.

² *Wetzel v. Ohio*, 371 U.S. 62 (1962), cited by respondents (Op. at 2, 9), is irrelevant. This is not a case where the sole remaining issue is costs.

³ Respondents misstate Maryland law. Irrespective whether this action can be classified as one for "legal malpractice", it is not an action grounded in negligence. Damages are a necessary element of a negligence claim. *See, Flaherty v. Weinberg*, 303 Md. 116, 128 (1985); *Glasgow v. Hall*, 24 Md. App. 525, 529 (1975), cited by respondents (Op. at 9). Damages are not an element of a cause of action for breach of contract, or this deliberate tort. *See*, Pet. at 7, 13; Mallen and Smith, *Legal Malpractice* (3rd ed. 1989), sec. 11.4 at 641, sec. 11.5 at 642-645.

In order to find a violation of 42 U.S.C. 1983, resolution of substantially the same questions is involved. *Cf. Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980); *Cuyler v. Sullivan*, 446 U.S. 335, 342-343 n.6 (1980). *And see, Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). Respondents' contention (Op. at 12) that our argument "is not properly raised" simply is incorrect.

3. Respondents also misstate our claim with respect to 42 U.S.C. 1983. Cases they cite (Op. at 13) holding that merely reporting to state agents does not make one a state actor have no applicability. What is alleged here, with evidence to support it, is that there was an agreement between Dale Kelberman, the prosecutor, and John Gill that Gill would convey, and Kelberman would accept from Gill, information Gill obtained during his representation of Dr. Hooper. When Kelberman agreed to accept the information, he knew Gill represented Dr. Hooper. For reasons stated in our petition, Fifth, Sixth, and Fourteenth Amendment rights were implicated and violated. This was not a conversation between the prosecutor and any private citizen. It was a conversation by the prosecutor with criminal defense counsel in which the evidence permissibly supports a conclusion that an agreement was made to convey and accept information obtained by Gill in the course of his representation of Dr. Hooper.

4. Contrary to respondents' contentions (Op. at 10, 12, 13), there are ample reasons to grant certiorari.⁴ The petition plainly shows that the Maryland Courts have ruled in manners that conflict with decisions of this Court and United States Courts of Appeals on matters that either directly involve or implicate federal interests. *See*, Rule 10.1 (a) and (b). Moreover, Rule 10.1 states that the criteria for certiorari review there set forth are "neither controlling nor fully measuring the Court's discretion." There are numerous reasons for granting the writ. *See*, Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th ed. 1986), sec. 4.17 at 222-223, sec. 4.26 at 238, paragraphs (h) and (k).

Totally apart from the fact that the Maryland Courts have misapplied federal law in their requirements for the quantum of evidence

⁴ Respondents cite Rule 17 in their argument. We assume they are referring to the predecessor of Rule 10 of the Rules adopted December 5, 1989, and effective January 1, 1990.

needed for a jury to decide whether there was the necessary agreement to trigger 42 U.S.C. 1983 liability, Gill's admitted conduct is so outrageously violative of basic concepts of the adversary system and Constitutional principles that review by this Court is warranted. The Maryland Courts have failed utterly in their responsibilities in the resolution of this case, and have further violated petitioner's Constitutional rights in the process.⁵

5 . For the foregoing reasons, and for the reasons stated in our petition, certiorari should be granted.

Respectfully submitted,

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⁵ The lack of merit in respondents' opposition is underscored by their irrelevant and inaccurate *ad hominem* attack on petitioner (Op . at 13-14) .

